

# “Instinct with an Obligation” and the “Normative Ambiguity of Rhetorical Power”

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## I. INTRODUCTION

In an obscure turn-of-the-century opinion, a little-known judge of an intermediate appellate court in New York described an employment agreement as “instinct with . . . an obligation” on the employer’s part not to terminate an employee during the six-year duration of the agreement, despite conceding that the contract did not expressly bind the employer to the term.<sup>1</sup> From these modest origins, twentieth-century contract jurisprudence has seen the flowering of the principle that an agreement or relation can be “instinct with an obligation” and therefore enforceable despite failing to satisfy formal requirements. No less a judge than Benjamin Cardozo frequently called on the instinct language in New York Court of Appeals opinions, and he even brought it with him to the United States Supreme Court.<sup>2</sup> In addition, other judges and theorists increasingly employed the phrase to support a wide array of arguments, such as the soundness of a particular statutory interpretation, the validity of employing equitable principles, or the appropriateness of expanding or diminishing express contract terms.<sup>3</sup> The instinct language has even

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<sup>1</sup> *McCall Co. v. Wright*, 117 N.Y.S. 775, 779 (App. Div. 1909) (Scott, J.), *aff’d*, 91 N.E. 516 (N.Y. 1910).

<sup>2</sup> *See, e.g.*, *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 319 (1933) (statute “instinct with the recognition of a duty”); *Nixon v. Condon*, 286 U.S. 73, 87 (1932) (Texas Supreme Court case “instinct with the concession”); *Jarl Co. v. Village of Croton-On-Hudson*, 179 N.E. 708, 710 (N.Y. 1932) (opinion “instinct with the assumption”); *Sinclair v. Purdy*, 139 N.E. 255, 258 (N.Y. 1923) (language setting up a trust “instinct with an obligation”); *Ward v. Erie R.R.*, 129 N.E. 886, 888 (N.Y. 1921) (statute “instinct with plan and purpose”), *cert. denied*, 256 U.S. 696 (1921).

<sup>3</sup> For cases involving statutory construction, see *Heard v. Cuomo*, 610 N.E.2d 348 (N.Y. 1993); *Hendrickson v. Griggs*, 672 F. Supp. 1126, 1133–37 (N.D. Iowa 1987), *appeal dismissed*, 856 F.2d 1041 (8th Cir. 1988). In *Hendrickson*, the court found an implied duty on the part of states that accept federal funds to meet federal

transcended national boundaries.<sup>4</sup>

Most important, "instinct with an obligation" has helped kindle two major enlargements of twentieth-century contract liability. First, the phrase presented a justification for extinguishing the requirement of "mutuality of obligation," a previously entrenched barrier to the enforceability of agreements, which required express language binding both parties. Second, in what one writer has called the most "significant protection of non-union employees" during this century,<sup>5</sup> the instinct language helped create a new non-consensual employer obligation to terminate employees only for cause.<sup>6</sup>

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statutory requirements for the detention of juveniles. *Hendrickson*, 672 F. Supp at 1333-35. The court noted that, "[a]s usual, Congress 'has voiced its wishes in muted strains and left it to the courts to discern the theme' indirectly." *Id.* at 1133 (quoting *Rosado v. Wyman*, 397 U.S. 397 (1970)). Nevertheless, "for reasons best stated by Judge Cardozo, the Court finds a duty without asking whether Iowa formally promised to comply with these requirements. . . . [The federal statute] is instinct with an obligation by any reasonable reading of the statute and its regulations." *Hendrickson*, 672 F. Supp. at 1135 n.13 (citations omitted); see also *Fenning v. American Type Founders*, 109 A.2d 689, 694 (N.J. Super. Ct. App. Div. 1954), *certification denied*, 122 A.2d 528 (N.J. 1956); *Joseph F. Mittleman Corp. v. Murray L. Spies Corp.*, 129 N.Y.S.2d 822 (Sup. Ct. 1954) (equitable principles); sources cited *infra* notes 87-102 and accompanying text (contract terms).

For theoretical work using or discussing instinct language, see, Michael Ansaldi, *Texaco, Pennzoil and the Revolt of the Masses: A Contracts Postmortem*, 27 HOUS. L. REV. 733, 796-97 (1990) (instinct used to interpret press release); Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1337 n.240 (1989) (instinct used to interpret letter of intent).

<sup>4</sup> See, e.g., *Dawson v. Helicopter Exploration Co.*, 1955 S.C.R. 868, 875 (Can. 1955).

<sup>5</sup> Todd M. Shaughnessy, *Johnson v. Morton Thiokol and Handbook Disclaimers: Allowing Employers to Have Their Cake and Eat It Too*, 1992 UTAH L. REV. 1065, 1075 (1992).

<sup>6</sup> See *infra* notes 110-38 and accompanying text. Cardozo probably expected the expansion of the approach: "Write an opinion, and read it a few years later when it is dissected in the briefs of counsel. You will learn for the first time the limitations of the powers of speech, or, if not those of speech in general, at all events your own. . . . One marvels sometimes at the ingenuity with which texts the most remote are made to serve the ends of the argument or parable." Benjamin N. Cardozo, *Law and Literature, and Other Essays and Addresses*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO*, *THE CHOICE OF TYCHO BRAHE* 341-42 (Margaret E. Hall ed. 1947); see also Zechariah Chafee, Jr., *The Disorderly Conduct of Words*, 41 COLUM.

This essay analyzes the use of “instinct with an obligation,” accounts for its success, and evaluates its impact. I make the effort, in part, to underscore the significance and power of instinct reasoning in contract jurisprudence. I will show that the approach shares importance with, and many of the attributes of, the standards of good faith and unconscionability. Unlike those heavily analyzed standards, however, “instinct with an obligation” has never been the focus of study and is only sporadically mentioned in contract literature, although it is central in a host of cases.<sup>7</sup> The evolution of the use of instinct reasoning also reflects the experience of twentieth-century contract law and therefore sheds light on the nature and formal attributes of that law.

In addition, a study of how courts invented, validated, and expanded the use of “instinct with an obligation” helps elucidate the role of rhetoric in contract jurisprudence, a subject recently invigorated by Judge Richard Posner in his book on Cardozo.<sup>8</sup> Posner attributes Cardozo’s fame to the power of his

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L. REV. 381, 404 (1941).

<sup>7</sup> A Westlaw search reveals that the phrase has been used in over 300 state and federal cases up to early 1995. In a remarkable series of lectures presented at The Ohio State University Law School, later turned into a book, Professor Grant Gilmore called such cases “case law undergrounds.” GRANT GILMORE, *THE DEATH OF CONTRACT* 56 (1974). Kessler and Fine devoted a page to “instinct with an obligation” in their landmark 1964 article on *culpa in contrahendo*. Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 425 (1964). They did little more, however, than to relate the facts of *Wood v. Lucy, Lady-Duff Gordon*, 118 N.E. 214 (N.Y. 1917), set forth the instinct paragraph, and call efforts by courts in cases such as *Wood*, “remarkable creativity.” Kessler & Fine, *supra*, at 425.

<sup>8</sup> RICHARD A. POSNER, *CARDOZO A STUDY IN REPUTATION* (1990). The quotation about rhetorical power in the title of this article is Judge Posner’s. *Id.* at ix. The topic of law and language is burgeoning. See generally LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993); *THE RHETORIC OF LAW* (Austin Sarat & Thomas R. Kearns eds., 1994) (and authorities cited therein); Brenda Danet, *Language in the Legal Process*, 14 L. & SOC’Y. REV. 445 (1980).

Rhetoric has several meanings. See James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Art of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 687 (1985). In this article I use rhetoric to refer to the style or strategy of an argument or reason as opposed to its substance, merits, or logic. A rhetorical argument is “grounded on terms which are contestable, and whose content and authority are created through interpretive argument, rather than existing prior to it.” Kathryn Abrams, *The Unbearable Lightness of Being Stanley Fish*, 47 STAN. L. REV. 595, 596 (1995) (reviewing STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING, TOO* (1994)). I shall refer to “instinct reasoning” when considering the

rhetoric—to the effectiveness of the strategy and style of his arguments—more than to the substance and logic of his opinions. Posner adds, however, that powerful rhetoric in the law is controversial.<sup>9</sup> I study “instinct with an obligation,” an example of rhetorical power, in part to shed additional light on the value and role of rhetoric in contract law.

Part II of this Article traces the rise and expansion of instinct language and explains its appeal. On the one hand, I show that courts took up the reasoning because it dispenses with formal barriers to enforcement and authorizes courts to base decisions on implication, context, and the equities. It also helped courts bridge the murky divide between assent-based and non-consensual theories of obligation. In these regards, instinct reasoning shares many attributes with other contract-law safety valves such as good faith and unconscionability. On the other hand, courts were also attracted to “instinct with an obligation” because of the rhetorical power of the phrase. The language is an unusual and memorable departure from ordinary English, but it still manages to capture an idea tersely and concisely. Instinct rhetoric also is unhesitating and unyielding, ascribing to its user apparent, if not real, certitude. Such an eloquent display of confidence not only disarms skeptics, but also diminishes any dissonance in its user.

Part III of this Article considers the implications of the flourishing of “instinct with an obligation.” The cases reaffirm the shared and continuously evolving role of principles supporting the exercise of private preferences and principles legitimizing intervention in private agreements such as fairness, equality, morality, and efficiency. Moreover, the instinct cases underscore the triumph of contract standards that temper the rigidity of rules, authorize a deep contextual analysis, and invoke the equities of a case. Despite the ascendancy of standards and the plethora of contract principles, decisions employing instinct reasoning illustrate that, for the most part, contract decisions are not ad hoc; they are constrained by the bounds of the assent paradigm, the implications of context, the norms of the relevant community, and the criteria developed by courts under the common law process.

Utilizing the instinct language as a paradigm, Part III also evaluates the role of rhetoric in the development of contract law. The precise question addressed is whether courts’ use of instinct rhetoric instead of, for example, the

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substance or logic of the cases using the phrase and “instinct rhetoric” when focusing on the language’s composition and style.

<sup>9</sup> POSNER, *supra* note 8, at ix-x. Rhetoric “embraces all verbal methods of persuasion, including the emotive and the deceitful, [therefore] the normative implications of ‘powerful rhetoric’ are equivocal.” *Id.* at 54.

language of implied terms or reasonable expectations, has made any difference. Does the rhetoric illuminate judicial reasoning or distort or camouflage it? Does it affect results? For better or worse?

I conclude that instinct rhetoric has contributed to clearer decisions because the language succinctly captures and conveys the idea that courts should engage in a deep contextual analysis in deciding contract cases. In addition, more often than not, courts seem to feel inspired or, perhaps, challenged by the language to explain and justify why the context is "instinct with an obligation." Occasionally, however, the rhetoric seems to substitute for elaboration.

Ultimately, it is difficult to say whether courts would have decided any cases differently were it not for the availability and use of instinct rhetoric. The social, economic, and psychological forces that influenced courts to create and nurture instinct reasoning probably would have led them to invent other language or to focus more on existing doctrines to achieve their purposes. Instinct rhetoric may thus be more an effect than a cause of legal change.

I suspect, however, that instinct rhetoric did help courts break with the past. It facilitated, perhaps even hastened, the validation and proliferation of new, mostly helpful ways of thinking about and deciding contract cases. The value of rhetoric is inevitably controversial, however, because it can draw attention to, and therefore propagate, not only valuable ideas but bankrupt ones as well.

## II. THE RISE OF "INSTINCT WITH AN OBLIGATION"

### A. *Creation*

Near the turn of the century, under the doctrine of mutuality of obligation, an enforceable contract required express promissory language binding each party to the other.<sup>10</sup> If a purported agreement did not specify a quantity, a time for performance, or otherwise make the nature of a promisor's obligation clear, courts declined to enforce the agreement even if the circumstances suggested that the parties intended to be bound. For example, a court would refuse to enforce an agreement requiring a buyer to purchase all of its coal from a seller if the buyer did not promise to use any coal.<sup>11</sup> Although rigid, the doctrine of mutuality of obligation was clear and predictable and conformed well to local, short-term commercial relations, in which the parties could clearly express their

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<sup>10</sup> See, e.g., *Schubert v. Woodward*, 167 F. 47 (8th Cir. 1909).

<sup>11</sup> See E. ALLAN FARNSWORTH, *CONTRACTS* 76 (2d ed. 1990).

mutual obligations.<sup>12</sup>

Courts began to override the mutuality of obligation doctrine for at least two reasons. First, methods of doing business began to change as improved transportation and communication supported the growth of multistate corporations and the rise of national markets.<sup>13</sup> To participate in these new, uncertain markets, businesses sought agreements of longer duration to stabilize sources of supply, prices, and demand.<sup>14</sup> Yet, ironically, the likelihood of changed conditions increased with the duration of agreements, thereby limiting the possibility of allocating all of the risks in these new contracts. Parties to these agreements therefore began to leave terms open and to rely on the cooperation, flexibility, and good faith of their contracting partner.<sup>15</sup> Courts began to recognize that parties entered these contracts "with the purpose that they shall be performed"<sup>16</sup> and that barring such contracts would stifle entrepreneurial activity that was opening markets and creating new products on a nationwide scale.<sup>17</sup> Courts therefore began to infer mutual obligations when a

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<sup>12</sup> See Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 416-17 (1988).

<sup>13</sup> See *Marrinan Medical Supply, Inc. v. Ft. Dodge Serum Co.*, 47 F.2d 458, 460 (8th Cir. 1931).

<sup>14</sup> Pratt, *supra* note 12, at 417 (1988); see also *Marrinan Medical Supply*, 47 F.2d 458 (one of the first federal cases to rely on the "instinct with obligation" language). While determining whether a complicated commission sales and exclusive licensing contract for anti-hog cholera serum was valid, the *Marrinan Medical Supply* court stated:

But in recent times, the real or supposed needs and exigencies of business and the ingenuity of business men and their lawyers have evolved a class of contracts which have the earmarks of both sales contracts [these would not be subject to ongoing conditions as they were merely executory] and factorage contracts [subject to ongoing obligations]. It is not easy to determine into which class a particular contract falls.

*Id.* at 460.

<sup>15</sup> See, e.g., Robert A. Hillman, *Court Adjustment of Long Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L. J. 1.

<sup>16</sup> *Marrinan Medical Supply*, 47 F.2d at 462.

<sup>17</sup> Pratt, *supra* note 12, at 442. See also *Kane v. Chrysler Corp.*, 80 F. Supp. 360, 363 (D. Del. 1948), which stated:

Contracts such as here involved are neither pure sales nor pure agency contracts. They have been developed to meet the distribution needs of

contract did not expressly create them, so long as the overall circumstances including custom, prior dealings, and the writings evidenced an intent to contract.<sup>18</sup>

Second, the mutuality of obligation approach began to wane because it created formal barriers to enforcement at a time when formalism was losing favor. Influenced by the nineteenth-century analytic method,<sup>19</sup> the formalists had concluded that courts mechanically deduced the appropriate decision from previously constructed legal categories and rules.<sup>20</sup> The legal realists, on the other hand, perceived that courts based their decisions not on abstract legal rules, but on the pragmatic evaluation of the particular facts and equities.<sup>21</sup> Freed from the conceptual shackles of formalism, courts escalated their enforcement of agreements when they believed the parties intended to contract even if the agreement lacked express promissory language and, therefore, lacked mutuality of obligation.<sup>22</sup>

"Instinct with an obligation" provided fresh, aesthetically pleasing, and interesting language that authorized a flexible contextual analysis.<sup>23</sup> It therefore constructed an attractive channel through which the courts could effectuate the new approach to mutuality issues. The language first appeared in *McCall Co.*

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manufactured products where such distribution cannot be had upon merit alone. In many cases the product or model is new and the sales must be encouraged by expensive show rooms, service stations and by intensive and extensive advertising and salesmanship. . . . The contracts are entered into in good faith by both parties and utilized by business men and must be given a construction in accordance with the intent of the parties.

*Id.* at 363.

<sup>18</sup> See, e.g., *Marrinan Medical Supply*, 47 F.2d at 462; *Ehrenworth v. George F. Stuhmer & Co.*, 128 N.E. 108, 110 (N.Y. 1920); *Wood v. Lucy, Lady-Duff Gordon*, 118 N.E. 214, 215 (N.Y. 1917); *O'Connor v. Bankers Trust Co.*, 289 N.Y.S. 252, 274 (Sup. Ct. 1936), *aff'd*, 1 N.Y.S.2d 641 (App. Div. 1937), *aff'd*, 16 N.E.2d 302 (N.Y. 1938) (per curiam).

<sup>19</sup> Girardeau A. Spann, *A Critical Legal Studies Perspective on Contract Law and Practice*, 1988 ANN. SURV. AM. L. 223, 226.

<sup>20</sup> See, e.g., Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 496 (1987).

<sup>21</sup> Spann, *supra* note 19, at 227.

<sup>22</sup> See, e.g., *T.B. Walker Mfg. Co. v. Swift & Co.*, 200 F. 529 (5th Cir. 1912); *Golden Cycle Mining Co. v. Rapson Coal Mining Co.*, 188 F. 179, 182-83 (8th Cir. 1911).

<sup>23</sup> See *infra* notes 53-65 and accompanying text.

*v. Wright*,<sup>24</sup> discussed in the introduction. Judge Scott, writing for the New York Appellate Division, apparently coined the phrase since it was absent from both briefs. McCall Co., engaged in producing dress patterns and publishing fashion magazines, had employed Wright in various capacities for three years.<sup>25</sup> During that period his knowledge of the business, including its trade secrets, increased, and he gained responsibility.<sup>26</sup> Wright then broke an employment contract between the parties, but shortly thereafter returned to McCall's employ under a new contract.<sup>27</sup> This contract included a six-year term, reserving McCall Co. a right to terminate upon thirty days' notice.<sup>28</sup> The contract also set forth "an increasing scale of compensation" and a covenant not to compete.<sup>29</sup> Wright nevertheless quickly joined a competitor, and McCall Co. sought an injunction restraining Wright from working elsewhere.<sup>30</sup> The court found merit in McCall Co.'s request. Responding directly to Wright's claim that the contract lacked mutuality of obligation, Judge Scott conceded that McCall Co. did not "by precise words engage to employ [Wright] for the term specified," but nonetheless found the "whole contract" to be "instinct with such an obligation."<sup>31</sup>

The court's conclusion that McCall Co. agreed to be bound to a six-year term appears correct in light of the contract's specification of a six-year duration.<sup>32</sup> Moreover, McCall Co. may have been willing to commit itself to a long-term arrangement in light of Wright's apparent value to the firm and his questionable allegiance to it. Regrettably, Judge Scott did not elaborate on these themes, referring only to his conclusion as a "fair construction" of the agreement.<sup>33</sup> At its birth, then, the instinct language substituted for elaboration, not a good sign if a goal of judicial decisions is certainty, clarity, and predictability.

At any rate, the attractiveness of "instinct with an obligation" did not escape Judge Cardozo, who used the language for the first time in *Moran v.*

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<sup>24</sup> 117 N.Y.S. 775 (N.Y. App. Div. 1909), *aff'd*, 91 N.E. 516 (N.Y. 1910).

<sup>25</sup> *Id.* at 776.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 777.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 779.

<sup>32</sup> McCall Co. also reserved the right to terminate upon thirty days notice, but the court found that the clause did not destroy the mutuality of obligation. *Id.*

<sup>33</sup> *Id.*



*Standard Oil Co.*<sup>34</sup> The language was probably brought to Cardozo's attention by Moran's brief to the New York Court of Appeals, which quoted *McCall Co.*'s use of "instinct."<sup>35</sup> Moran expressly agreed to sell Standard Oil's paint for five years in return for commissions on sales "to be made," but Standard Oil did not expressly agree to employ Moran for five years.<sup>36</sup> When Standard Oil refused to supply paint, Moran sought damages.<sup>37</sup> The trial court held in favor of Standard Oil because the contract "did not impose on [Standard Oil] a duty to employ" Moran for five years.<sup>38</sup> On appeal, Cardozo found an implied obligation to do so, stating:

[The law] does not look for the precise balance of phrase, promise matched against promise in perfect equilibrium. . . . There are times when reciprocal engagements do not fit each other like the parts of an indented deed, and yet the whole contract, as was said in *McCall Co. v. Wright*, may be "instinct with . . . an obligation" imperfectly expressed.<sup>39</sup>

Judge Cardozo was more careful than Judge Scott in explaining why the agreement was "instinct with an obligation" on Standard Oil's part. Cardozo argued that the court should not infer that the parties would have entered a one-sided agreement permitting Standard Oil to terminate at will, especially after assurances by Standard Oil's lawyers that Moran's future was "secure" for five years.<sup>40</sup> Moreover, the provision for the payment of commissions on sales "to be made" to Moran meant that Standard Oil must have had a duty to supply the product to Moran so that he could make sales and earn commissions.<sup>41</sup> Moran also had agreed to sell Standard Oil's paint for five years, something he could not do unless Standard Oil supplied the paint.<sup>42</sup> In addition, the parties called their writing an "agreement," which suggested that each party had committed itself.<sup>43</sup> Finally, Standard Oil had not sought a termination-at-will clause,

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<sup>34</sup> 105 N.E. 217 (N.Y. 1914).

<sup>35</sup> Brief for the Respondent-Appellant at 36, *Moran v. Standard Oil Co.*, 105 N.E. 217 (N.Y. 1914).

<sup>36</sup> *Moran*, 105 N.E. at 218-19.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 220.

<sup>39</sup> *Id.* at 221 (citation omitted) (quoting *McCall Co. v. Wright*, 117 N.Y.S. 775, 779 (App. Div. 1909), *aff'd*, 91 N.E. 516 (N.Y. 1910)).

<sup>40</sup> *Id.* at 220.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

suggesting that it was content with a five-year obligation.<sup>44</sup>

Cardozo's reasoning may have been correct as to the parties' intentions, although most of the factors he mentioned could be explained without finding that Standard Oil had agreed to be bound for five years. For example, the parties may have intended the term providing for commissions on sales "to be made" to come into play only when sales were made and commissions earned prior to Standard Oil's termination, not to guarantee Moran a right to *earn* commissions for five years. Moreover, neither Moran's five-year commitment, nor the writing's label as an "agreement," is very compelling; the parties could have "agreed" only that Moran would sell paint for five years unless Standard Oil terminated first. Cardozo may have been moved primarily by the perceived unfairness of a unilateral commitment by Moran.

Judge Cardozo returned to the "instinct with an obligation" language in *Wood v. Lucy, Lady Duff-Gordon*.<sup>45</sup> Cardozo wrote that Lucy, "a creator of fashions," whose "certificate of approval" was valuable to dress manufacturers, was bound to a contract in which she had given Wood the exclusive right to place her endorsements on dress designs and to sell her own designs, even though Wood had not expressly promised to do anything.<sup>46</sup> Cardozo found an implied obligation on Wood's part to use reasonable efforts, reasoning that Lucy would not otherwise have given Wood an exclusive right in which her only compensation was half the profits.<sup>47</sup> Cardozo stated that "the law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal."<sup>48</sup> Instead, "[a] promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed."<sup>49</sup>

*Wood v. Lucy* ensured a place for the instinct aphorism in contract jurisprudence.<sup>50</sup> First, in light of Lucy's grant of an exclusive agency, it is a more compelling case than *Moran* for finding that Wood actually agreed to use

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<sup>44</sup> *Id.* at 221.

<sup>45</sup> 118 N.E. 214, 214 (N.Y. 1917).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 214-15.

<sup>48</sup> *Id.* at 214.

<sup>49</sup> *Id.*

<sup>50</sup> Cardozo's attention may have been drawn to the phrase by Lucy's brief, which cited *Moran* for the general proposition that a contract required mutuality. Respondent's Brief at 12, *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917). This was poor strategy, of course, because the holding of *Moran* supported Wood's position.

reasonable efforts to market Lucy's designs (Why would Lucy convey an exclusive agency, if Wood had no obligation?). Instinct language therefore supplied a rationale for courts to do what they believed they were supposed to do, namely enforce the parties' intentions when they were "imperfectly expressed." Second, the case was interesting, even colorful. Lucy characterized the changing role of women and marketing in a new economic system. Yet the facts are simple and straightforward. It is no surprise that the case became a favorite of casebook editors and treatise writers.<sup>51</sup> Third, Cardozo, a well-known and respected judge, wrote with his usual flair, taking up the instinct language in the heart of the opinion. Cardozo was so effective in incorporating the phrase, in fact, that commentators sometimes forgot that the language was not his own.<sup>52</sup>

Perhaps most important, "instinct with an obligation" gained prominence after *Wood v. Lucy* because of the rhetorical appeal of the phrase. Somewhat antiquated and unusual even at the time, it was an exciting divergence from ordinary English. Instead of drab language of implied terms or reasonable expectations (for example, "from the circumstances we can imply an intention to contract"), instinct rhetoric was a charming and pleasant alternative.<sup>53</sup>

Instinct rhetoric also appealed because, like good poetry, it evoked meaning on several levels. According to the literal meaning of the language, a relation is "instinct with an obligation" when it is "infused" or "imbued"<sup>54</sup> or "filled or charged"<sup>55</sup> with an obligation. An obligation is "something that [commits] one to a course of action."<sup>56</sup> A relation could be "filled or charged" with an obligation, then, for many reasons. The use of the word "instinct" in

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<sup>51</sup> The case was picked up as early as 1921. See, e.g., ARTHUR L. CORBIN, *CASES ON THE LAW OF CONTRACT* § 309 (1st ed. 1921); GEORGE P. COSTIGAN, JR., *CASES ON THE LAW OF CONTRACTS* 467 (1st ed. 1921); see also SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS*, 8104 n.18 (4th ed. 1936). It is now found in numerous contracts casebooks.

<sup>52</sup> See, e.g., David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1825 (1991); Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 386 (1986).

<sup>53</sup> Legal terms can have "charm as verbal antiques or esoteric catchwords." Carl S. Smith, *Law as Form and Theme in American Letters: An Essay in Law and American Literature*, in *LAW AND AMERICAN LITERATURE* 1, 8 (1983). Of course, legal writing "serve[s] more sharply defined social needs than does literature." *Id.* at 7.

<sup>54</sup> WEBSTER'S NEW COLLEGIATE DICTIONARY 599 (1976).

<sup>55</sup> WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 951 (2d ed. 1979).

<sup>56</sup> WEBSTER'S NEW COLLEGIATE DICTIONARY 792 (1976).

the phrase also evokes an alternative meaning. An "instinct" is a "natural or inherent aptitude, impulse, or capacity,"<sup>57</sup> suggesting that the obligation isolated by the court arises "naturally" from the environment.<sup>58</sup>

Notwithstanding its multiple meanings, instinct rhetoric also appeared disarmingly simple. The language had the "terseness and tang of the proverb, and the maxim."<sup>59</sup> Unlike ordinary "legalese," "characterized by passive verbs, impersonality, nominalizations, long sentences, idea-stuffed sentences, difficult words, double negatives, [and] illogical order,"<sup>60</sup> instinct rhetoric was short, direct, and accessible. It therefore produced a "sense of fellowship awakened when judges talk in ways that seem to make us partners in the deliberative process."<sup>61</sup> Moreover, it decreased the possibility of misunderstanding and error.<sup>62</sup>

Instinct rhetoric was also forceful and confident, containing "sincerity and fire."<sup>63</sup> An agreement "instinct with an obligation," was so "filled or charged" or "infused" with a duty that no reasonable person could doubt the obligation. Use of the language demonstrated Cardozo's utter confidence in the existence of a duty, helping to persuade the reader to discount contradictory evidence.<sup>64</sup>

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<sup>57</sup> *Id.* at 599.

<sup>58</sup> Technically "instinct" may not be a metaphor but a statement of principle. On the other hand, the principle is expressed metaphorically in the sense that it describes a contract as though it were alive. Metaphors in the law include "penumbras that protect privacy; sliding scales that do and do not assure equality; a marketplace of ideas . . . and even dreadful fruit from [a] poisonous tree." Robert K. L. Collins, *Legal Metaphors Shape Our Vision of the Law*, NAT'L. L.J. May 23, 1994, at A19, A20; see also Burr Henly, "Penumbra": *The Roots of Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81, 81 (1987) ("slippery slopes, bright and blurred lines, constitutional foothills, scales of justice, level playing fields, and a wall of separation between church and state.") (citations omitted).

<sup>59</sup> Cardozo, *supra* note 6, at 342.

<sup>60</sup> Robert W. Benson, *The End of Legalese: The Game Is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 531 (1984-85). Mellinkoff states that the language of the law tends to be "wordy . . . unclear . . . pompous . . . [and] dull." DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 24 (1963).

<sup>61</sup> Cardozo, *supra* note 6, at 346. "As precision is the loudest virtue of the language of the law . . . so wordiness is its noisiest vice." Mellinkoff, *supra* note 60, at 399.

<sup>62</sup> MELLINKOFF, *supra* note 60, at 402-04. For another discussion of the artful use of a single sentence, see POSNER, *supra* note 8, at 56.

<sup>63</sup> Cardozo, *supra* note 6, at 342.

<sup>64</sup> This has been called "assertive rhetoric" in that it "aims to close off questioning and doubt and to exclude the possibility of competing claims." Mary L.

Moreover, instinct rhetoric camouflaged the court's flexibility by appearing to confine decisions to existing obligations that simply needed to be liberated from the contextual web, thereby mollifying or disarming critics of judicial activism.<sup>65</sup>

### B. Expansion

After *Wood*, "instinct with an obligation" began to take solid root. Judge Cardozo drew upon the rhetoric not only in contract cases, but when faced with a gap in a trust, statute, or precedent.<sup>66</sup> As with *Moran* and *Wood v. Lucy*, he employed the language to draw together disparate sources of contextual evidence to extract the core meaning.<sup>67</sup> More important, Cardozo's opinions usually, but not always, were persuasive on what the evidence meant.<sup>68</sup>

Other New York judges followed Cardozo's lead, employing instinct language in cases involving both written and oral contracts when the parties apparently intended to contract but the expression of their intent was "imperfect."<sup>69</sup> Relying in no small part on the instinct language, courts all but

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Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 859 (1986). Notwithstanding this characteristic of instinct rhetoric, I argue later that the language inspired courts to explain their results. See discussion *infra* part III.B. and accompanying notes.

<sup>65</sup> "The strength that is born of form and the feebleness that is born of the lack of form are in truth qualities of the substance. They are tokens of the thing's identity. They make it what it is." Cardozo, *supra* note 6, at 340.

<sup>66</sup> See, e.g., cases cited *supra* note 2.

<sup>67</sup> "In the end there must be a synthesis that will bring the severed parts together." *Marchant v. Mead-Morrison Mfg. Co.*, 169 N.E. 386, 391 (N.Y. 1929), *appeal dismissed*, 282 U.S. 801 (1930). Cardozo used other rhetoric to describe this methodology such as "pregnant with the assumption." *Id.* at 390; see also cases cited *supra* note 2.

<sup>68</sup> See, e.g., *Marchant*, 169 N.E. 386; *Sinclair v. Purdy*, 139 N.E. 252 (N.Y. 1923); *Ward v. Erie R.R.*, 129 N.E. 886 (N.Y. 1921), *cert. denied*, 256 U.S. 696 (1921).

<sup>69</sup> See e.g., *Ehrenworth v. George F. Stuhmer & Co.*, 128 N.E. 108, 110 (N.Y. 1920); *Dairymen's League Co-Op. Ass'n v. Holmes*, 202 N.Y.S. 663, 669 (App. Div. 1924), *aff'd*, 147 N.E. 171 (N.Y. 1924); *In re Brunswick's Estate*, 256 N.Y.S. 879, 884-85 (Sup. Ct. 1932); *Renner v. John T. Stanley Co.*, 240 N.Y.S. 148, 149 (Sup. Ct. 1930).

New York courts did place some limits on the use of the instinct language. For example, one court declined to find that an employee's agreement to forgo a tort claim was "instinct with an obligation" on the part of the employer to pay a lifetime pension

repudiated the principle that a contract could be unenforceable for indefiniteness.<sup>70</sup> In such cases, courts generally examined the business context to determine whether the parties intended to contract and the terms of the contract, but the resolution of these issues was not always persuasive.

In *O'Connor v. Bankers Trust Co.*,<sup>71</sup> for example, the court found a contractual obligation in very general oral and written promises and assurances to insure the bank deposits of a failing bank made during the heart of the depression by the chairman of the Clearing House committee, a group of New York banks, to the comptroller of the currency and the president of the failing bank.<sup>72</sup> The committee feared that closing the bank would add to the existing panic and cause a run on other banks.<sup>73</sup> The chairman told the president that the Clearing House members would "stand behind him one hundred per cent."<sup>74</sup> He wrote similar assurances to the comptroller.<sup>75</sup> Although these communications contained no details as to how the Clearing House members proposed to stand behind the failing bank, no time for performance, and no formula for apportionment of payments among members, the court still remarked that "the conversations . . . were with contractual intent. They were more than mere promises to enter into some contractual engagement in the future; they were 'instinct with an obligation.' . . . No contract is rejected for indefiniteness whose purpose is so clear. . . . 'Indefiniteness must reach the point where construction becomes futile.'"<sup>76</sup> The court therefore "found" that the member banks could use their discretion in determining how to pay the failing bank's debts, that they were obliged to do so in a reasonable time, and

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to the injured employee. The court held that the employee had not intended to make a claim against her employer even though she had received the alleged life-long pension for seven years. *Harvey v. J.P. Morgan & Co.*, 25 N.Y.S.2d 636, 636 (App. Term 1938) (per curiam), *aff'd*, 23 N.Y.S.2d. 960 (App. Div. 1940); *see also* *Saltzman v. Barson*, 205 N.Y.S. 548, 549 (App. Div. 1924) (document lacking in characteristics that would make it "instinct with obligation"), *rev'd in part*, 146 N.E. 618 (N.Y. 1925).

<sup>70</sup> *See, e.g.*, *James Talcott, Inc. v. Marshall Field & Co.*, 15 N.Y.S.2d 846 (Sup. Ct. 1939), *aff'd*, 17 N.Y.S.2d 1020 (App. Div. 1940).

<sup>71</sup> 289 N.Y.S. 252 (Sup. Ct. 1936), *aff'd*, 1 N.Y.S.2d 641 (App. Div. 1937), *aff'd*, 16 N.E.2d 302 (N.Y. 1938) (per curiam).

<sup>72</sup> *Id.* at 265-69.

<sup>73</sup> *Id.* at 260-62.

<sup>74</sup> *Id.* at 263.

<sup>75</sup> *Id.* at 263-64.

<sup>76</sup> *Id.* at 273-74 (citations omitted) (in part quoting *Cardozo, J. in Cohen & Sons v. M. Lurie Woolen Co.*, 133 N.E. 370, 371 (N.Y. 1921)).

that liability was to be apportioned on the basis of the amount of each bank's capital funds.<sup>77</sup>

The perhaps overheated use of "instinct with an obligation" was not limited to New York cases enforcing "imperfect" obligations. The court in *Schmidl v. Central Laundry & Supply Co.*<sup>78</sup> used the language to help whittle down an express covenant not to compete upon termination. A written contract calling for Schmidl to solicit customers for Central Laundry contained a five-year covenant not to compete, which included a promise not to "solicit or canvas the trade or patronage of the customers" of Central Laundry.<sup>79</sup> Finding that the contract was "instinct with the obligation . . . not to solicit the customers, whom [Schmidl] had brought" to Central Laundry during Schmidl's term of employment, the court nonetheless barred Schmidl from doing so for only nine months.<sup>80</sup> The court expressly acknowledged that its decision was based on fairness and justice.<sup>81</sup> Instinct reasoning had become a safety valve not only to authorize courts to enforce intentions, but to achieve just results.

### C. Proliferation

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<sup>77</sup> *Id.* The court ultimately found that the members of the Clearing House committee had no power to bind their respective banks to insure the deposits of a troubled member. *Id.* at 289. Perhaps the court got the best of both worlds. It could chastise businessmen for not living up to their agreements, while avoiding a decision that would have cost the banks several million dollars.

<sup>78</sup> 13 N.Y.S.2d 817 (Sup. Ct. 1939).

<sup>79</sup> *Id.* at 820. The pertinent clause read in part:

It is further agreed that the second party will not, for a period of five (5) years after the termination of this employment for any consideration whatsoever, directly or indirectly, as employer, employee, or otherwise, engage in the linen supply or laundry business of any rival or competing person, firm, or corporation in the same or similar business within the boundaries of the County of Monroe, State of New York, and the adjoining counties, and the second party will not, at any time, solicit or canvas the trade or patronage of the customers of the first party, or collect or deliver linen supplies or laundry to any of them for any other person, firm or corporation, engaged in the linen supply or laundry business or any similar business.

*Id.* The clause further provided that Central Laundry would be entitled to an injunction to enforce the non-compete clause. *Id.*

<sup>80</sup> *Id.* at 824.

<sup>81</sup> *Id.*

By 1945 "instinct with an obligation" was firmly ensconced in the legal lexicon of the New York bench. At about the same time, courts began to use the language extensively outside of New York in contract and other cases. In part, this was the result of the importance and influence of New York law. In addition, the appeal of *Wood v. Lucy* reached outside of New York.

Many of the contract-law cases reflected the approach Cardozo had in mind when he adopted the instinct language in *Wood v. Lucy*: focusing on the context to determine the parties' intentions about an incomplete contract. For example, in *Kane v. Chrysler Corp.*,<sup>82</sup> the Kane's dealership contract with Dodge did not expressly require the Kanes to buy any automobiles for resale or expressly require Dodge to sell any cars.<sup>83</sup> The Delaware district court noted that the contract provided for an exclusive dealership,<sup>84</sup> required the dealer to maintain a suitable place of business, obligated the dealer to maintain a supply of spare parts, and contained "meticulous provisions for the termination of the agreement" that would be difficult to explain if "the parties knew [the contract] did not exist and had no binding force."<sup>85</sup> In finding that the parties intended to contract, the court drew upon *Wood v. Lucy*:

Clearly the parties intended to enter into some agreement for the sale and purchase of automobiles and parts. . . . Merely because the exact obligation of the parties is not clearly stated is no reason to fail to see the obligation inherent in almost every line of the contract itself. In language approved by Justice Cardozo in *Wood v. Lucy, Lady Duff-Gordon*, . . . "A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed."<sup>86</sup>

Although *Kane's* focus on avenues of avoiding the mutuality doctrine resembled many of the early New York cases invoking "instinct with an obligation," other cases both inside and outside of New York continued to expand the language's domain. For example, courts utilized the aphorism to diminish onerous express terms. In *Rein v. Robert Metrik Co.*,<sup>87</sup> a two-and-one-half year written lease of an apartment under construction commenced on

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<sup>82</sup> 80 F. Supp. 360 (D. Del. 1948).

<sup>83</sup> *Id.* at 362-63.

<sup>84</sup> Most courts applied the mutuality limitation if the agreement did not call for exclusive dealings. *See, e.g., Zeyher v. S.S. & S. Mfg. Comp.*, 319 F.2d 606 (7th Cir. 1963).

<sup>85</sup> *Kane*, 80 F. Supp. at 362-63.

<sup>86</sup> *Id.* (citation omitted).

<sup>87</sup> 105 N.Y.S.2d 160 (Sup. Ct. 1951).



October 1, at or near the time of the tenant's marriage.<sup>88</sup> Nevertheless, the lease contained a term expressly exculpating the landlord for delay and providing that the lease would still be valid.<sup>89</sup> The landlord had orally assured the tenant that the apartment would be ready on time, but some six months beyond the promised date construction still was not completed.<sup>90</sup> Based more on fairness than on the parties' actual intentions, the New York court ruled that the lease was "instinct with an obligation" on the landlord's part to make the demised premises available within a reasonable time, unless "factors beyond [the] control" of the landlord made that impossible.<sup>91</sup> The court granted the tenant rescission because the landlord had not provided proof of "diligence" in attempting to complete the building on time.<sup>92</sup>

Recently, Judge (now Justice) Scalia saw the compatibility of instinct reasoning and the burgeoning doctrine of good faith performance in his decision to ameliorate the harshness of an express term. In *Tymshare, Inc. v. Covell*,<sup>93</sup> a written employment contract allowed Covell, a sales representative, commissions on sales above a particular quota.<sup>94</sup> However, the contract also expressly authorized Tymshare to raise the sales quota retroactively without notice and reason, which would decrease Covell's compensation.<sup>95</sup> Covell claimed Tymshare exercised the power in bad faith to deprive him of earned compensation.<sup>96</sup>

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<sup>88</sup> *Id.* at 161.

<sup>89</sup> The provision stated "[i]f Landlord shall be unable to give possession of the demised premises on the date of the commencement of the term . . . Landlord shall not be subject to any liability for the failure to give possession on said date. . . . [A]nd no such failure to give possession on the date of commencement of the term shall in any wise affect the validity of the lease or the obligations of Tenant hereunder . . . ." *Id.* at 162.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*; see also *Schisgall v. Fairchild Publications, Inc.*, 137 N.Y.S.2d 312 (Sup. Ct. 1955). In *Schisgall* the court found that a publisher could be liable in tort for failing to promote a book it had agreed to publish even though the contract permitted the publisher to discontinue publication if it believed there was no public demand for the work. *Id.* at 317-18. After quoting the "instinct" aphorism in *Wood v. Lucy*, the court found a "special relationship between author and publisher that 'may not be specifically expressed, and yet the whole factual situation may be instinct with a duty which should be imposed by law upon the publisher.'" *Id.* at 318.

<sup>93</sup> 727 F.2d 1145 (D.C. Cir. 1984).

<sup>94</sup> *Id.* at 1148.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1148-49.

Under the doctrine of good faith performance, courts bar conduct that contradicts the reasonable expectations of the parties.<sup>97</sup> Courts have recognized that even a provision purporting to grant sole power to a party does not necessarily authorize the party to exercise the power "for any reason whatsoever, no matter how arbitrary or unreasonable."<sup>98</sup> Such an interpretation would probably conflict with the other party's reasonable expectations because it would deny that party the fruits of the contract.

Judge Scalia therefore sought to determine whether Tymshare's retroactive alteration of Covell's sales quota and compensation contradicted Covell's reasonable expectations, despite the express clause expressly permitting such conduct. Judge Scalia stated:

[A]greeing to such a provision would require a degree of folly on the part of these sales representatives we are not inclined to posit where another plausible interpretation of the language is available. It seems to us that the "sole discretion" intended was discretion to determine the existence or nonexistence of the various factors that would reasonably justify alteration of the sales quota. Those factors would include . . . an unanticipated volume of business from a particular customer unconnected with the extra sales efforts of the employee assigned to that account; and . . . a poor overall sales year for the company, leaving less gross income to be expended on commissions. . . . But the language need not (and therefore can not reasonably) be read to confer discretion to [increase] the quota for any reason whatever—including . . . a simple desire to deprive an employee of the fairly agreed benefit of his labors.<sup>99</sup>

In short, Judge Scalia reasoned that the parties probably did not intend to permit the employer to reduce the employee's compensation retroactively and arbitrarily because a reasonable employee would not agree to such an onerous provision.<sup>100</sup> Reasonable parties, in other words, intend to incorporate terms that society would find fair and just. Judge Scalia saw the compatibility of this reasoning and the logic of the instant cases. He remarked that his approach

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<sup>97</sup> *Id.* at 1152.

<sup>98</sup> *Id.* at 1154; *see also* *Nolan v. Control Data Corp.*, 579 A.2d 1252, 1259 (N.J. Super. Ct. App. Div. 1990).

<sup>99</sup> *Tymshare*, 727 F.2d at 1154. The reasoning is similar when the issue is a bank's right to set NSF fees: "[D]iscretion had to be exercised within the confines of the reasonable expectations of the depositors." *Best v. U.S. Nat'l Bank of Oregon*, 739 P.2d 554, 558 (Or. 1987).

<sup>100</sup> *Tymshare* 727 F.2d at 1154.

“perform[ed] the same function executed (with more elegance and precision) by Judge Cardozo in *Wood v. Lucy*,” where Cardozo “found that an agreement which did not recite a particular duty was nonetheless “instinct with . . . an obligation” . . . .”<sup>101</sup> Put another way, instinct reasoning supplies the terms a party acting in good faith must follow.<sup>102</sup>

Relying in part on the instinct language, courts also began to infer obligations based primarily on the relationship between the parties. For example, in *Onderdonk v. Presbyterian Homes of New Jersey*,<sup>103</sup> the court determined that a “special relationship” existed between the management and the residents of a life-care community.<sup>104</sup> The court found an implied covenant to release financial information to residents concerning administration of the community:

Where fairness and justice require, even though the parties to a contract have not expressed an intention in specific language, the courts may impose a constructive condition to accomplish such a result when it is apparent that it is necessarily involved in the contractual relationship. In *Wood v. Lucy, Lady Duff-Gordon*, Justice (then Judge Cardozo said): “A promise may be lacking, and yet the whole writing may be ‘instinct with an obligation,’ imperfectly expressed.”<sup>105</sup>

The court did not explain when a term was “necessarily involved in the contractual relationship.” Instead, it frankly revealed its goal in finding an implied obligation: to reassure elderly residents of the financial soundness of

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<sup>101</sup> *Id.* at 1152 (quoting *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (1917) (quoting from *McCall v. Wright*, 117 N.Y.S. 775, 779 (App. Div. 1909), *aff’d*, 91 N.E. 516 (N.Y. 1910))).

<sup>102</sup> For some recent additional cases, see *Seal v. Riverside Federal Sav. Bank*, 825 F. Supp. 686 (E.D. Pa. 1993); *Don King Productions, Inc. v. Douglas*, 742 F. Supp. 741 (S.D.N.Y. 1990), *adhered to on reh’g*, 742 F. Supp. 786 (S.D.N.Y. 1990); *United States v. Castelbuono*, 643 F. Supp. 965 (E.D.N.Y. 1986); *Lee v. Joseph E. Seagram & Sons, Inc.*, 413 F. Supp. 693 (S.D.N.Y. 1976), *aff’d*, 552 F.2d 447 (2d Cir. 1977); *Radio Picture Show Partnership v. Exclusive Int’l Pictures, Inc.*, 482 N.E.2d 1159 (Ind. App. 1985); *Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp.*, 266 N.W.2d 22 (Iowa 1978); *Commonwealth v. Johnson*, 483 N.E.2d 838 (Mass. App. Ct. 1985); *Shapiro v. Dictaphone Corp.*, 411 N.Y.S.2d 669 (App. Div. 1978).

<sup>103</sup> 425 A.2d 1057 (N.J. 1981).

<sup>104</sup> *Id.* at 1065–66.

<sup>105</sup> *Id.* at 1063 (citations omitted) (quoting from *Palisades Properties, Inc. v. Brunetti*, 207 A.2d 522, 531 (N.J. 1965)).

their community.<sup>106</sup>

In *Ciufo v. Ciufo*,<sup>107</sup> the court found that a marriage was "instinct with an obligation" on the part of each spouse to share his or her wealth with the other. The court therefore held that Mrs. Ciufo held half of the proceeds and real property of her business in constructive trust for her husband, despite evidence that Mr. Ciufo had been physically violent and a poor coworker.<sup>108</sup> Society no longer views a woman's role in a marriage as subordinate and no longer tolerates marital abuse. It is therefore unlikely that a court today would find the Ciufo marriage "instinct with an obligation" to share wealth. This suggests the importance of nonconsensual values in "instinct" cases.<sup>109</sup> It remained for the Michigan Supreme Court in 1980 to carry this logic to the important employment relationship.

#### D. "*Instinct with an Obligation*" and the Modern Employment Relationship

The employment-at-will rule, dominant for at least the last century,<sup>110</sup>

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<sup>106</sup> *Id.* at 1066.

<sup>107</sup> 60 N.Y.S.2d 848 (Sup. Ct. 1946).

<sup>108</sup> *Id.* at 859-61 (citations omitted). Another New York court used the "instinct with obligation" language to imply a constructive trust to benefit a divorced wife. *Scull v. Scull*, 462 N.Y.S.2d 890, 895 (App. Div. 1983), *aff'd*, 493 N.E.2d 238 (N.Y. 1986).

<sup>109</sup> See also *United States v. Castelbuono*, 643 F. Supp. 965 (E.D.N.Y. 1986). The *Castelbuono* court ruled that an agreement granting immunity to a criminal defendant in return for assisting prosecutors and investigators in a major money laundering case was "instinct with an obligation . . . to use reasonable efforts in supplying information to and cooperating with the Government." *Id.* at 970. The defendant was a Harvard Law graduate who masterminded a money laundering scheme. *Id.* at 967. The court admonished the defendant for failing to learn the lesson of *Wood v. Lucy* in his first-year contracts class. *Id.* at 970.

<sup>110</sup> For an excellent treatment of the employment-at-will rule, see Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976). Over 100 years ago, Horace Gray Wood wrote:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at-will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is determinable at the will of either party . . . .

holds that "[c]ontracts for permanent employment . . . in the absence of distinguishing features or provisions or . . . consideration in addition to the services rendered . . . are indefinite hirings, terminable at the will of either party."<sup>111</sup> Under the rule, in the absence of an express term of employment, an employer can terminate an employee at any time for any reason.

By the 1980s the time was ripe for a change in the at-will employment rule based on the perceived harshness of denying employees job security and the leverage it afforded employers.<sup>112</sup> In *Toussaint v. Blue Cross & Blue Shield of Michigan*,<sup>113</sup> the Michigan Supreme Court accomplished the task, finding that the employment relationship in certain circumstances was "instinct with an obligation" of just-cause termination only. After Toussaint inquired about job security, an officer of Blue Cross gave Toussaint a manual of personnel policies and guidelines that set forth a company policy to: "treat employees leaving Blue Cross in a fair and consistent manner and to release employees for just cause only."<sup>114</sup> The company also told Toussaint that, if he performed satisfactorily, the company would employ him until he retired.<sup>115</sup> Nevertheless, after hearing complaints and reviewing his performance, Blue Cross terminated Toussaint.<sup>116</sup> Toussaint brought a wrongful termination action against Blue Cross based both upon oral and written employment contracts.<sup>117</sup>

The court found that a duty of just-cause termination could arise by virtue of an oral or written express promise or based on the employee's "legitimate expectations" arising from the employer's policy statements.<sup>118</sup> Further:

While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes

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H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (William S. Hein & Co. 1981) (1877), *quoted in* Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 329 (1991-92).

<sup>111</sup> *Lynas v. Maxwell Farms*, 273 N.W. 315, 316 (Mich. 1937) (*quoted in* Dallas Moon, *Rowe v. Montgomery Ward & Co.: The Demise of Toussaint?*, 1992 DET. C.L. REV. 711).

<sup>112</sup> *See, e.g.*, Deborah A. Schmedemann & Judi Mclean Parks, *Contract Formation and Employee Handbooks: Legal, Psychological, and Empirical Analyses*, 29 WAKE FOREST L. REV. 647, 652 n.38 (1994).

<sup>113</sup> 292 N.W.2d 880 (Mich. 1980).

<sup>114</sup> *Id.* at 893.

<sup>115</sup> *Id.* at 884, 904.

<sup>116</sup> *Id.* at 903.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 885.

them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal workforce, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation."<sup>119</sup>

This passage clarifies what was only intimated in many of the earlier instinct cases. An agreement could be "instinct with an obligation" based not on the parties intentions at all, but on principles and policies arising from the relationship of the parties and their course of conduct.<sup>120</sup> In the employment realm, these principles and policies included the establishment of fair employment practices and greater job security for employees when an employer creates a general environment suggesting as much.<sup>121</sup>

As with *Wood v. Lucy* before it, *Toussaint* instigated an explosion of litigation, both in Michigan and elsewhere, with most cases specifically relying on the instinct passage. Cases confirmed that an employee need not have had actual knowledge of nor have relied on the "just cause" policy statement.<sup>122</sup> In addition, a duty of just-cause employment could arise out of the introduction of

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<sup>119</sup> *Id.* at 892 (footnote omitted).

<sup>120</sup> *Id.* at 890.

<sup>121</sup> See, e.g., Linzer, *supra* note 52, at 350 (public policy similar to the duty to rescue once a rescue has begun); David Dominguez, *Just Cause Protection: Will the Demise of Employment At Will Breathe New Life Into Collective Job Security?*, 28 IDAHO L. REV. 283, 290 (1991-92).

<sup>122</sup> *Smith v. Colorado Interstate Gas Co.*, 794 F. Supp. 1035, 1041 (D. Colo. 1992); *Kinoshita v. Canadian Pac. Airlines, Ltd.*, 724 P.2d 110, 117 (Haw. 1986); *Woolley v. Hoffman-LaRoche, Inc.*, 491 A.2d 1257, 1268 n.10 (N.J. 1985), *judgment modified*, 499 A.2d 515 (N.J. 1985). Moreover, courts could bind employers even when employees began work prior to the adoption of an employment manual. *Pelizza v. Reader's Digest Sales & Services Inc.*, 624 F. Supp. 806, 810 (N.D. Ill. 1985); *Damrow v. Thumb Cooperative Terminal, Inc.*, 337 N.W.2d 338, 342-43 (Mich. Ct. App. 1983).

written procedures for termination<sup>123</sup> or an employer's previous approach to unsatisfactory performance, such as the creation of a probationary status.<sup>124</sup> In fact, some courts ignored statements in manuals disclaiming any legal obligation or reserving the right to terminate without cause when other provisions contradicted the statements and were "instinct with an obligation" of just-cause employment.<sup>125</sup>

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<sup>123</sup> *Pelizza*, 624 F.Supp. at 810.

<sup>124</sup> *Brewster v. Martin Marietta Aluminum Sales, Inc.*, 378 N.W.2d 558, 565 (Mich. Ct. App. 1985). In *Brewster*, Martin Marietta had terminated Brewster for poor performance and insubordination. *Id.* at 559. Based on a supervisor's testimony that the plaintiff's work had been unsatisfactory, the court stated:

[I]t appears to us that the probationary period in which the plaintiff was given an opportunity to change or correct her job performance and alleged insubordination and the wording of [the supervisor's] letter, among other things such as the memoranda to plaintiff of the excellent work she had done prior to the period of probation, shows that the defendant had established a policy pertaining to her by conduct and words to terminate only for just cause upon which she could rely.

*Id.* at 565; see also *Johnson v. Nasca*, 802 P.2d 1294, 1297 & n.2 (Okla. Ct. App. 1990) (reasonable expectation based on a pattern of practice in the work place).

<sup>125</sup> In *Jones v. Central Peninsula Gen. Hosp.*, 779 P.2d 783, 787 (Alaska 1989), for example, the manual disclaimed any legal obligation: "The purpose of this manual is to provide information to all . . . employees. It is not a contract of employment nor is it incorporated in any contract of employment." *Id.* at 787. (noting that a one-sentence disclaimer was followed by eighty-five pages of detailed text, the court stated that the manual "does not unambiguously and conspicuously inform the employee that the manual is not part of the employee's contract of employment." *Id.* at 788. In *Angotti v. State Farm Mut. Auto. Ins. Co.*, No. 91-1048, 1991 WL 244962, at \*4 (6th Cir. Nov. 22, 1991) (per curiam), one provision of an employment handbook stated that "continued employment is contingent upon, among other things, [the employee's] demonstration of . . . ability to meet prospecting and production requirements." Another term provided that "either [the employee] or the Company may terminate this Agreement by written notice." *Id.* Relying in part on the "instinct with an obligation" aphorism, the court held that the handbook taken as a whole established a just-cause employment relationship. *Id.* Otherwise, the provision making employment contingent upon production requirements would be meaningless.

A survey between 1980 and 1991 revealed forty-one cases that failed to give dispositive weight to disclaimers contained either in a handbook or job application. Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 382 (1991-92).

Of course, not all courts utilized the instinct language in finding for an employee,<sup>126</sup> and some upheld the termination-at-will rule.<sup>127</sup> However, even in the latter cases, no court repudiated the instinct reasoning. Instead, courts simply found that particular employment relationships were not "instinct with an obligation" of just-cause employment. For example, some courts failed to find an implied promise of just-cause employment in employment manuals that lacked specificity<sup>128</sup> or contained clear disclaimers.<sup>129</sup> In addition, courts balked at finding for employees whose expectations were based on a "manager's guide" not rightfully in their possession<sup>130</sup> or on general statements of the employee's "bright future" with the company<sup>131</sup> or simply on the kind of employment.<sup>132</sup> Unlike *Toussaint*, these cases were not always clear on whether an employee had to have actual knowledge of the statement or conduct that created expectations of just-cause employment. At any rate, the difficult line-drawing necessary to distinguish these situations from those "instinct with an obligation" of just-cause employment began to undermine the approach.

In fact, in its most recent account of *Toussaint*, the Michigan Supreme Court expressed its concern with the message some courts had derived. In *Rowe v. Montgomery Ward & Co.*,<sup>133</sup> a representative of Montgomery Ward

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<sup>126</sup> See, e.g., *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744, 752-53 (Idaho 1989) (decision based on the obligation of good faith and fair dealing).

<sup>127</sup> See cases cited *infra* notes 128-32.

<sup>128</sup> *Stewart v. Chevron Chem. Co.*, 762 P.2d 1143, 1145 (Wash. 1988) (employment manual used unspecific terms such as "should"); see also *Staggs v. Blue Cross of Maryland*, 486 A.2d 798, 809 (Md. Ct. Spec. App. 1985) (general statements made in a personnel handbook or other publications do not rise to the level of an enforceable covenant), *cert. denied*, 493 A.2d 349 (Md. 1985).

<sup>129</sup> See, e.g., *Cox v. Electronic Data Sys. Corp.*, 751 F. Supp. 680, 688-90 (E.D. Mich. 1990) (employment agreement clearly stated that employment was at-will); *Fussell v. Health Care & Retirement Corp. of Am.*, No. 90-1774, 1991 U.S. App. LEXIS 8970, at \*13 (6th Cir. Apr. 30, 1991) (per curiam) (disclaimer on first and last page of manual was effective).

<sup>130</sup> *Triplett v. Electronic Data Sys. (EDS)*, 710 F. Supp. 667, 673 (W.D. Mich. 1989), *aff'd*, 900 F.2d 260 (6th Cir. 1990).

<sup>131</sup> *Transou v. Electronic Data Sys.*, 767 F. Supp. 1392, 1397 (E.D. Mich. 1991), *aff'd*, 986 F.2d 1422 (6th Cir. 1993).

<sup>132</sup> *Gertler v. Goodgold*, 487 N.Y.S.2d 565, 569 (App. Div. 1985) (professor unsuccessfully argued that tenure was "instinct with an obligation" to provide faculty members with adequate research facilities), *aff'd*, 489 N.E.2d 748 (N.Y. 1985).

<sup>133</sup> 473 N.W.2d 268 (Mich. 1991).



told Rowe she would not be terminated as long as she met her sales quota.<sup>134</sup> Referring to *Toussaint*, the court stated:

[T]his Court joined the forefront of a nationwide experiment in which, under varying theories, courts extended job security to nonunionized employees. . . . However the theory remains troubling because of those instances in which application of contract law is a transparent invitation to the factfinder to decide *not* what the "contract" was, but what "fairness" requires.<sup>135</sup>

Preferring this time to narrow its decision to the issue of mutual assent, the court focused on the parties' language and found the representative's statements insufficient to support Rowe's contention of an implied-in-fact promise limiting Montgomery Ward's right to terminate her employment.<sup>136</sup> Moreover, the court remarked that "oral statements of job security must be clear and unequivocal to overcome the presumption of employment at will."<sup>137</sup> The court also found that the disclaimer contained in the employee manual clearly and unambiguously contemplated at-will employment.<sup>138</sup>

In light of *Rowe*, the future of just-cause employment remains unclear. Nevertheless, at present it is fair to say that courts have utilized instinct reasoning to increase employee protection, thereby affecting a significant change in employment law in the United States. Where courts previously required clear evidence of the parties' intention to rebut the presumption of at-will employment, *Toussaint* and its progeny substituted the test of whether an employer had created a situation "instinct with an obligation" of just-cause employment. The requirement of mutual assent to the terms of a contractual obligation was no longer essential.

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<sup>134</sup> *Id.* at 270.

<sup>135</sup> *Id.* at 269. For a discussion of the *Rowe* decision and its implications, see Dallas Moon, *Rowe v. Montgomery Ward & Co.: The Demise of Toussaint?*, 1992 DET. C.L. REV. 711 (*Rowe* was a refinement and not an overruling of the theories in *Toussaint*).

<sup>136</sup> *Rowe*, 473 N.W.2d at 274.

<sup>137</sup> *Id.* at 275.

<sup>138</sup> *Id.* at 277; *see also* *Carlson v. Hutzel Corp. of Michigan*, 455 N.W.2d 335, 338-39 (Mich. Ct. App. 1990) (employer can unilaterally alter a written policy with regard to arbitration); *In re Certified Question*, 443 N.W.2d 112 (Mich. 1989), *conformed to in* *Bankey v. Storer Broadcasting Co.*, 882 F.2d 208 (6th Cir. 1989); *Kalifa v. Henry Ford Hosp.*, 401 N.W.2d 884, 890 (Mich. Ct. App. 1986) (employees covered by a collective bargaining agreement cannot avail themselves of the policy-manual reasoning of *Toussaint*).

### III. THE SIGNIFICANCE OF "INSTINCT WITH AN OBLIGATION"

A study of instinct reasoning offers important insights concerning the nature of modern contract law. The analysis also helps formulate a response to Judge Posner's implicit question about the value of judicial rhetoric.

#### A. *The Nature of Modern Contract Law*

##### 1. *Contract Law's Pluralism*

Contract theorists have spilled considerable ink analyzing the relationship of principles supporting the exercise of private preferences and principles legitimizing judicial intervention in the contracting process, ranging from fairness, equality, and morality to efficiency.<sup>139</sup> The story of instinct reasoning does not hold out any new or dramatic insight into this relationship. Instead, it reaffirms and substantiates a view of the importance of both consensual and interventionist principles in contract law in a continuously evolving framework, reflecting the social, economic, and political forces of a pluralist society.

We saw that courts conceived instinct reasoning to facilitate new methods of doing business during the prominence of laissez faire economics and freedom of contract and the decline of legal formalism.<sup>140</sup> It was not surprising during this period for courts to override burdensome contract doctrine that interfered with the parties' presumed intentions as gleaned from the circumstances or, put another way, to "track lay understanding rather than force lay persons to conform their transactions to rigid legal categories . . . ."<sup>141</sup> For example, Cardozo sought to show in *Moran v. Standard Oil Co.* and *Wood v. Lucy* that his decisions reinforced the parties'

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<sup>139</sup> For example, Charles Fried posited that the promises of contracting parties dominate contract law. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 1-27 (1981). In contrast, Grant Gilmore insisted that court-supplied, non-consensual principles "swallowed up" private contract law. GILMORE, *supra* note 7, at 55-85. Critical theorists refer to the problem as the "fundamental contradiction" between freedom of the individual and the need for relations with others. See Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 844-47 (1992-93).

<sup>140</sup> See *supra* notes 13-22 and accompanying text.

<sup>141</sup> POSNER, *supra* note 8, at 93.

actual intentions, which they simply expressed "imperfectly."<sup>142</sup> Even at the outset, however, courts did not ignore interventionist principles. Recall that in *Moran*, for example, Cardozo frowned on the "one-sidedness" of an arrangement that would have permitted Standard Oil to terminate at will.<sup>143</sup> Cardozo sought to ensure that each party enjoyed the fruits of the exchange according to their presumed purposes in contracting. In addition, although not expressly stated, Cardozo seemed to want to enforce Lucy's promise of an exclusive agency in *Wood v. Lucy* at least in part because of the moral principle that people should keep their promises.<sup>144</sup>

As time progressed, the free-market approach declined, and legislatures responded to the "perceived excesses" of the market by creating the twentieth-century welfare state.<sup>145</sup> At least in emphasis, instinct cases reflected this shift. Courts began more outwardly and directly to use the instinct reasoning to support decisions based on fairness or other policies. For example, in *O'Connor*, the court found vague promises to be "instinct with an obligation" in order to avoid panic and a run on New York banks during the depression.<sup>146</sup> In *Toussaint*, the court took great pains to establish a nonconsensual right of just-cause employment to confer on employees greater rights in the workplace.<sup>147</sup>

Although interventionist principles may have increased in importance or

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<sup>142</sup> See *supra* notes 34–52 and accompanying text.

<sup>143</sup> See *supra* note 40 and accompanying text.

<sup>144</sup> See also Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 921 nn.76–77 (1985) (promise enforceable in cases such as *Wood v. Lucy* when promisor to receive a "tangible economic benefit"); Note, *Benjamin N. Cardozo: A Directive Force in Legal Science*, 69 B.U. L. REV. 213, 225 (1989) (*Wood v. Lucy* "promoted the ethics in honoring one's commitments in commercial settings"). See generally FRIED, *supra* note 139.

<sup>145</sup> Richard E. Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161, 1175–76 (1975); see also P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 716–18 (1979). The rise of the welfare state in America began with factory laws and worker's compensation laws designed to "safeguard the individual against the uncertain nature" of industrialized society. BERNARD SCHWARTZ, *THE AMERICAN HERITAGE HISTORY OF THE LAW IN AMERICA* 204 (1974); see also KARL POLANYI, *THE GREAT TRANSFORMATION* 149–50 (1944) (countermove against economic liberalism and laissez-faire was a "spontaneous reaction" to protect against destruction of the social order).

<sup>146</sup> See *supra* notes 71–77 and accompanying text.

<sup>147</sup> See *supra* notes 113–21 and accompanying text.

even gained the upper hand during this period, few courts completely ignored consensual principles. Often courts focused on interventionist principles to determine what the parties reasonably or fairly must have intended. For example, recall that in *Tymshare*, Judge Scalia preserved Covell's earned sales commissions despite Tymshare's express right to cancel them retroactively, at least in part because he believed that parties acting fairly and reasonably would not have agreed to permit the employer to withdraw earned commissions just to increase its own gains.<sup>148</sup> Even in *Toussaint*, the court offered an alternative assent-based ground for protecting Toussaint.<sup>149</sup>

Individualism has resurfaced in the late twentieth century in the form of the deregulation movement, in part the result of a general disillusionment with social programs.<sup>150</sup> It is no surprise in this environment that courts have begun to restrict the domain of instinct reasoning. For example, we saw that the Michigan Supreme Court in *Rowe* narrowed its focus to determine whether Montgomery Ward had clearly and unequivocally promised just-cause employment.<sup>151</sup> All in all, the experience of instinct reasoning supports Grant Gilmore's observation of an orderly evolution of contract law consisting of "alternating rhythms" of classicism, symbolized by order and logic, and romanticism, characterized by experimentation and improvisation.<sup>152</sup> Further, these periods, according to Gilmore, are brought on by psychological, social, and economic forces reacting to the dominant legal regime.<sup>153</sup>

## 2. *The Triumph of Standards in Contract Law*

Instinct reasoning is one of several legal safety valves that authorizes judges to appraise the circumstances and equities of a case, to expand legal texts, and to avoid mechanical application of or manipulation and obfuscation of rules.<sup>154</sup> Such legal mechanisms, which help ensure the continuity of the

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<sup>148</sup> See *supra* notes 93–102 and accompanying text.

<sup>149</sup> See *supra* note 118 and accompanying text.

<sup>150</sup> Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597, 627–28 (1987).

<sup>151</sup> See *supra* notes 133–38 and accompanying text.

<sup>152</sup> GILMORE, *supra* note 7, at 103.

<sup>153</sup> *Id.*

<sup>154</sup> See generally Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 66 (1992). Recently Professor Kaplow characterized rules as consisting of "an advance determination of what conduct is

rule of law because they “enable the content of legal norms to change while ensuring that the legal order continues as an unbroken unity,”<sup>155</sup> are, of course, not limited to contract law. For example, the Supreme Court has expanded express Bill of Rights guarantees through “penumbras,” formed by emanations from those guarantees that help give them life and substance.<sup>156</sup>

Within contract law, we have already seen the close relationship between instinct reasoning and the legal standard of good faith performance.<sup>157</sup> Instinct reasoning also shares many attributes with the doctrine of unconscionability. Both require a deep contextual analysis of the process by which contracts are formed and an examination of the purpose and effect of the resulting terms. Together they furnish courts with an impressive arsenal for either finding or striking an obligation.

Some theorists contend that contract standards such as unconscionability and good faith decrease the law’s predictability and increase the costs of contract planning and adjudication of disputes because they enlarge the factors judges can employ in deciding cases.<sup>158</sup> Indeed, they argue that standards tempt

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permissible, leaving only factual issues for the adjudicator.” Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992). Rules therefore confine the decisionmaker to a range of preestablished elements. *Id.* at 589; see also Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 355 (1973). Standards, on the other hand, “entail leaving both specification of what conduct is permissible and factual issues for the adjudicator.” Kaplow, *supra*, at 560; see also Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976) [hereinafter Kennedy, *Form and Substance*] (“The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.”). Of course, much of law falls somewhere between these poles. A rule can be very general, for instance, and a standard quite specific. Professor Kennedy notes that “[a] rule setting the age of legal majority at 21 is more general than a rule setting the age of capacity to contract at 21.” *Id.* at 1689. Moreover, “[a] standard of reasonable care in the use of firearms is more particular than a standard of reasonable care in the use of ‘any dangerous instrumentality.’” *Id.* Of course, rules and standards tend to conflate in actual operation, and the definitions here omit many of their attributes.

<sup>155</sup> M. P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 760 (1969) (quoting JULIUS STONE, *LEGAL SYSTEM AND LAWYERS’ REASONING* 25 (1964)).

<sup>156</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). Professor Charny equates instinct reasoning and penumbras. See Charny, *supra* note 52, at 1828–30 & n.44.

<sup>157</sup> See *supra* notes 93–102 and accompanying text.

<sup>158</sup> Although the costs of promulgating a detailed and comprehensive rule may be higher than adopting a more general standard, neo-formalists believe that the savings realized by applying the rule more than make up for these potential greater costs.

judges to decrease their "analytical rigor"<sup>159</sup> or, worse, to usurp power more appropriately residing in the legislature<sup>160</sup> or in the parties themselves. Moreover, these theorists have little faith that courts can and will successfully develop specific criteria to fill out the meaning of these standards in various contexts.

Parties undoubtedly incur costs attempting to predict the factors a court may take into account in determining whether a relation is "instinct with an obligation." Moreover, at least some courts seem to have engaged in broad, perhaps inaccurate generalizing about the responsibility of various social actors (e.g., spouses must always share their wealth) and about the need for particular contract clauses (e.g., employers do not need terminable-at-will employment contracts).<sup>161</sup> In fact, in their effort to reach a fair result, a few courts seem to have felt little need at all to engage in deep analysis of the issue at hand.<sup>162</sup> Ironically, such judicial activity undoubtedly has resulted in some unfair decisions.

My strong impression, however, is that the benefits of instinct reasoning outweigh its costs. For one thing, the rise of instinct reasoning avoided the costs of promulgating and administering specific rules to accommodate the new social and economic realities. This benefit probably outweighs the cost of applying instinct reasoning. For the most part, courts have also utilized instinct reasoning competently and coherently by establishing a framework for implementing consensual and interventionist principles in particular contexts,

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Kaplow, *supra* note 154, at 621.

<sup>159</sup> Even Ellinghaus, a strong supporter of unconscionability, makes the point. Ellinghaus, *supra* note 155, at 761.

<sup>160</sup> See Kennedy, *Form and Substance*, *supra* note 154, at 1752-53 (describing the argument).

<sup>161</sup> Courts can also compare the conduct of similarly situated commercial parties to determine whether particular behavior fits a community standard. This approach to fairness questions, however, presents many opportunities for error in evaluating individual behavior and assessing the community's mores. Some believe that there is "no way to make a distributional judgment fairly." Alan Schwartz, *Comments on Professor Harrison's Paper*, 1988 ANN. SURV. AM. L. 115, 120. Moreover, it ensures adherence to the "predominant morals of the marketplace," and precludes serious consideration of more desirable alternatives. Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 629-30 (1975).

<sup>162</sup> Standards may "allow courts to act as roving commissions to set aside those agreements whose substantive terms they find objectionable." Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 294 (1975).

thereby conferring meaning on the language and limiting judicial discretion.<sup>163</sup>

Structurally, instinct reasoning resembles the judicial approach to unconscionability. Although unconscionability has itself been the subject of severe criticism on the grounds of its vacuousness,<sup>164</sup> courts have helpfully isolated criteria and established precedent for applying the standard. The paradigm case for finding unconscionability involves both "bargaining naughtiness," diminishing the quality of a party's assent (also called "procedural unconscionability"), and grossly unfair terms (known as "substantive unconscionability").<sup>165</sup>

The bargaining process may be tainted with procedural unconscionability when a party unduly influences her counterpart<sup>166</sup> or misrepresents the facts.<sup>167</sup> Procedural unconscionability also encompasses sneaky drafting techniques such as burying controversial terms in fine print, creating a "linguistic maze" of contradictory provisions,<sup>168</sup> or drafting incomprehensible terms.<sup>169</sup>

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<sup>163</sup> See *infra* part III.A.3. "[L]egal doctrines . . . represent . . . time-tested approaches for determining what facts are relevant, why they are relevant, [and] the degree of strength of the relevance." Walter E. Oberer, *On Law, Lawyering and Law Professing: The Golden Sand*, 39 J. LEGAL EDUC. 203, 205 (1989).

<sup>164</sup> The leading article is Arthur Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

<sup>165</sup> *Id.* at 488, 539–40.

<sup>166</sup> For example, a sophisticated seller may knowingly induce an uneducated buyer to make a purchase beyond the buyer's means. See, e.g., *Frostifresh Corp. v. Reynoso*, 274 N.Y.S.2d 757, 758 (Dist. Ct. 1966) (contract unconscionable in part because of salesman's awareness of buyer's imminent termination of employment), *rev'd on other grounds*, 281 N.Y.S.2d 964 (App. Term 1967); see also Ellinghaus, *supra* note 155, at 771. Undue influence occurs when a party engages in conduct that overpowers the will of another and induces him to do something that he would not have done otherwise. See, e.g., *Waters v. Min Ltd.*, 587 N.E.2d 231, 234 (Mass. 1992).

<sup>167</sup> See, e.g., *Davis v. Kolb*, 563 S.W.2d 438, 438 (Ark. 1978).

<sup>168</sup> *Gladden v. Cadillac Motor Car Div.*, 416 A.2d 394, 401 (N.J. 1980). The court, applying contract interpretation principles to a tire manufacturer's guarantee, concluded that a contract term limiting the buyer's remedy was unenforceable because the guarantee presented the tire owner with a "linguistic maze" of contradictory provisions. *Id.* The court indicated that the conflicting terms of the guarantee had induced the purchaser into believing "that he was obtaining a guarantee of performance." The court called the contract "a mélange of overlapping, variant, misleading, and contradictory provisions." *Id.* A concurring judge would have held that the remedy limitation was unconscionable. *Id.* at 404 (Pashman, J., concurring).

<sup>169</sup> For example, courts utilize the doctrine to evaluate the quality of consumer

The subject of substantive unconscionability is egregious terms. Some terms are substantively unconscionable because they are immoral or contravene public policy. Even short of such obvious constraints, a term may be substantively unconscionable if it denies a party substantially what she bargained for and performs no reasonable function in the trade.<sup>170</sup> Courts also consider whether a term serves the legitimate needs of a party or simply provides an unfair advantage.<sup>171</sup> Although the best case for finding unconscionability involves both procedural and substantive unconscionability, some courts have struck terms considered unfair without evidence of lack of assent. Still, such decisions are not revolutionary departures from the assent principle because courts usually reason that the gross imbalance in terms proves that something must have been wrong with the formation process.<sup>172</sup>

As with unconscionability, instinct reasoning authorizes courts to weigh the formation process and the nature of terms, not generally to annul an obligation, however, but to find, create, or define one. Courts proceed in this fashion when the bargaining process is not only devoid of assent-compromising conduct such as coercion, misrepresentation, or sneaky conduct, but when the context affirmatively suggests the parties assented to a particular obligation. As we saw, courts find such "super-assent" based primarily on a contextual investigation of the purposes of a contract, believing that the parties must have agreed to terms designed to further each party's goals.<sup>173</sup> In addition, the terms implied must not only avoid problems of imbalance, but also be "super-conscionable" in the sense that they guarantee each party the fruits of the exchange. These areas of inquiry are obviously interrelated, and it is no surprise that most cases employing instinct reasoning involve an analysis both of assent and the fairness of the contract, albeit with the emphasis changing depending on the context and the societal influences of the time.<sup>174</sup>

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assent when consumers who lack information and sophistication are confronted by industry-wide, one-sided form contracts. Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 25-26 (1981).

<sup>170</sup> *Id.* at 32-33.

<sup>171</sup> *Id.* at 33-34.

<sup>172</sup> *See, e.g.,* Jones v. Star Credit Corp., 298 N.Y.S.2d 264, 267 (Sup. Ct. 1969).

<sup>173</sup> *See, e.g., supra* notes 93-102 and accompanying text. Courts also consider the labels the parties attach to their writings, the express duties assigned under the contract, and the relationship of the parties. *See supra* notes 40-49, 103-09 and accompanying text.

<sup>174</sup> *See supra* notes 139-53 and accompanying text.



### 3. *The Relative Determinacy of Instinct Reasoning*

Courts obviously enjoy some discretion in investigating “super-assent” and “super-conscionability” in instinct cases. After all, the enterprise involves, among other things, implying terms based on probable but not certain intentions and on evaluating the fairness of an exchange. The absence of definitive proof suggests that there will be many debatable cases. Nevertheless, instinct language is not solely rhetorical and hollow. The method is not indeterminate in the sense that courts can reach any result in any instinct case. A court could not have found that the *Tymshare* employment contract was “instinct with an obligation” on the part of Tymshare to give the company to Covell or that the agreement in *Wood v. Lucy* was “instinct with an obligation” on Lucy’s part to extend the exclusive agency beyond the one-year term. Such decisions would exceed the boundaries of assent and would be unfair and bad policy.<sup>175</sup>

This suggests that in some cases courts can harmonize the principles for

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<sup>175</sup> Such decisions would be unfair because they would deny one party the fruits of the exchange and would take property from the party without compensation. The decisions would be poor policy because, among other things, they would supply terms the parties would not have wanted had they bargained over the matters, thereby increasing the costs of contracting.

Some theorists see all of law as a branch of rhetoric, not as a “system of rules.” Austin Sarat & Thomas R. Kearns, *Editorial Introduction* to *THE RHETORIC OF LAW* 8 (Austin Sarat & Thomas R. Kearns, eds. 1994). One such theorist sees contract law as an indeterminate “rhetorical structure,” but applauds its nature: “It is *because* it is a world made up of materials that pull in diverse directions that contract law can succeed in its endless project of making itself into a formal whole.” Stanley Fish, *The Law Wishes to Have a Formal Existence*, in *THE FATE OF LAW* 159, 184 (Austin Sarat & Thomas R. Kearns eds., 1991). Focusing on the consideration doctrine, Fish remarks that “anticonsideration impulses can be harbored and even nurtured in contract doctrine where, rather than undermining the orthodox view, they provide it with the flexibility it needs.” *Id.* at 186–87. Consideration doctrine is therefore “upheld by the rhetorical structure it has generated.” *Id.* at 187.

Fish believes that law is legitimate not because it is a “determinate system of rules and distinctions” but because it specifies “the vocabulary and conceptual ‘neighborhood’ of decision making.” *Id.* at 195. Moreover, the law’s failure to acknowledge its indebtedness to “other discourses” is not unlike every other practice, which proceeds in “ignorance of its debts and complicities.” *Id.* at 204. Because of this approach, the law can decide disputes and arrange for prompt remedies, which enable us to live together in society.

determining when a relation is "instinct with an obligation"<sup>176</sup> and can reach decisions possessing "objective moral force."<sup>177</sup> Of course, the examples above are "easy" cases. Nevertheless, courts could have decided few instinct cases differently without raising eyebrows, at least after courts cleared the psychological hurdle of abandoning the mutuality of obligation doctrine. This is so precisely because of the close alignment of consensual and interventionist principles in most of the instinct cases.<sup>178</sup> Generally people who make agreements seek not only to achieve their own goals but to cooperate and be flexible so that the other party can also receive the fruits of the contract. Contracting parties may be motivated by altruism or may hope to gain by enhancing their reputation as a reliable contracting partner and by ensuring future relations with their counterpart.<sup>179</sup> Regardless of the motivation, the parties' intentions and interventionist principles such as fairness are likely to point in the same direction.

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<sup>176</sup> See, e.g., WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 255 (1973) ("[M]ost rules have 'a central core of habitually established content surrounded by a penumbra of doubtful border-line cases.'") (quoting John Dickinson, *Legal Rules: Their Application and Elaboration*, 79 U. PA. L. REV. 1052, 1085 (1931)); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 483 (1987) (noting that CLS "simply provides another coherent explanation of why *some* legal rules are underdetermined over the set of all cases").

<sup>177</sup> See Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 208-09 (1984).

<sup>178</sup> I recognize that this assumes away the issues of the unfairness of preexisting wealth patterns and how people form their preferences. These slippery questions rarely surface in instinct cases, which, for the most part, involve parties of relatively equal bargaining power. Even in *Toussaint*, the focus was not unfair bargaining power, but the fairness of creating general expectations of security in order to secure an efficient work force.

<sup>179</sup> See Stewart Macaulay, *Contract Law and Contract Research (Part II)*, 20 J. LEGAL EDUC. 460, 463 (1968) (noting that business is not interested in contract law because of the existence of cheaper private relational sanctions). See generally Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1, 4-6 (noting that such business realities may justify inferring an agreement to modify a contract). "[F]lexibility is a marked trend in marketing of goods . . . wherever long-range buyer-seller *relations* come to seem more important than exact definition of the risks to be shifted by the particular dicker in terms of quantity, quality, or price." Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 727 (1931).

Of course there are exceptions. The experiment in *Toussaint* of establishing a nonconsensual, policy-based employer obligation of just-cause employment is the most obvious. In general, however, even courts bent on a policy analysis have not strayed too far from the field of consensual exchange. In *Toussaint*, the court limited the range of the new obligation to situations where an employer "create[d] an environment" in which it was reasonable for employees to believe they enjoyed job security.<sup>180</sup> As a result of this judicial culture of taking the boundaries of consent in contracts cases seriously, if not literally, instinct methodology permits a range of possible results, i.e., the approach is sometimes "underdeterminate," but judges do not enjoy unbridled discretion.

In sum, the use of instinct reasoning obviously equips courts with an arsenal of weapons. Judges can emphasize consensual or interventionist principles in keeping with the social and economic environment, can adjust the meaning of assent and fairness to fit the circumstances, and can decide "hard" cases in conformity with one or another principle or a combination of principles.<sup>181</sup> But that is precisely the appeal of the instinct aphorism.<sup>182</sup> Our system of "private" exchange seems to work better than alternatives precisely because it seeks to harmonize the value of private preferences and the need for social control. Instinct reasoning encourages judges to appraise the entire set of circumstances and equities of individual cases in context-dependent situations. Against the backdrop of changing social and economic norms, instinct reasoning thus encapsulates a useful, flexible, but not unprincipled approach to deciding cases.<sup>183</sup> It is no surprise that Cardozo, who believed that the judicial process consists of "logic, and history, and custom, and utility, and the

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<sup>180</sup> *Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880, 892 (Mich. 1980). The supervisory manual in *Toussaint* stated: "Policy: It is the policy of the company to treat employees leaving Blue Cross in a fair and consistent manner and to release employees for *just cause only*." *Id.* at 903.

<sup>181</sup> Cardozo stated that the legal process "in its highest reaches is not discovery, but creation." BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166 (1921).

<sup>182</sup> Such an approach acknowledges the "limits of judicial reasoning." Henly, *supra* note 58, at 100, and therefore "[brings] law closer to the (informed) non-lawyer's sense of justice." POSNER, *supra* note 8, at 127. When the circumstances are "instinct with an obligation," "judicial interpretation is properly summoned to fill the void or interstice." *Heard v. Cuomo*, 610 N.E.2d 348, 350 (N.Y. 1993).

<sup>183</sup> See, e.g., Jefferson Powell, "*Cardozo's Foot*": *The Chancellor's Conscience and Constructive Trusts*, 56 LAW & CONTEMP. PROBS. 7, 22 (1993) (Cardozo's use of "instinct" means to interpret "sensibly and broadly").

accepted standards of right conduct,"<sup>184</sup> became enamored with instinct reasoning.

### B. *The Role of Rhetoric in Contract Law*

Part II concluded that instinct rhetoric appeals because it is unusual and memorable, poetic and charming, and yet certain and distinct. Moreover, the language reinforces a court's substantive findings by exuding confidence and forcefulness. Although some courts use the language as a "crutch[] on which [they] can rely to help make their decisions appear both definitive and neutral when candor is more difficult or risky,"<sup>185</sup> most do not. Instead, courts employ the rhetoric as a convenient slogan for capturing the idea that courts can and should find the meaning of a relation in the context.<sup>186</sup> Instinct rhetoric therefore seems to inspire or challenge most courts to elaborate on the circumstances. Conversely, it also serves as a useful exclamation point when courts have already engaged in a deep contextual analysis.

Cardozo stated that a message's literary style is a "token[] of the thing's identity. [It] make[s] it what it is."<sup>187</sup> Studies in linguistics support and add to this conclusion. They indicate that language shapes people's perceptions and conceptualizations of the world.<sup>188</sup> In general, the imagery evoked by instinct

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<sup>184</sup> Richard D. Rieke, *The Rhetoric of Law, A Bibliographical Essay*, in 18 TODAY'S SPEECH 49 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921)).

<sup>185</sup> SOLAN, *supra* note 8, at 4. Critics thought that "Cardozo's style served largely to mask the basic subjectivity" of his opinions. Richard H. Weisberg, *Law, Literature and Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283, 293 (1979) (discussing critics). But Cardozo himself was aware of the dangers of language: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

<sup>186</sup> But see Lawrence Kalevitch, *Gaps in Contracts: A Critique of Consent Theory*, 54 MONT. L. REV. 169, 182 n.33 (1993) ("instinct" reasoning is no more than a "question begging metaphor").

<sup>187</sup> Cardozo, *supra* note 6, at 340. According to Professor Weisberg, "style inevitably contributes to, and often controls, the present and future meaning of appellate opinions." Weisberg, *supra* note 185, at 309.

<sup>188</sup> Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1141 (1989) (describing the work of Paul Kay & Willet Kempton, *What is the Sapir-Whorf Hypothesis?* 86 AM. ANTHROPOLOGIST 65, 71 (1984)); see also Roger W. Brown & Eric H. Lenneberg, *A*

rhetoric appears to have caught the judicial imagination and helped establish a more flexible attitude about and approach to judicial decisionmaking. More specifically, the language seems to have served as a "figurative discourse"<sup>189</sup> for helping to legitimize the process of finding an obligation deeply imbedded in the circumstances or creating one. Perhaps the perspective nurtured by the instinct language even contributed to the willingness of lawmakers to consolidate other theories of obligation such as promissory estoppel.<sup>190</sup>

Despite these apparent accomplishments, I cannot prove that even one decision would have been different had the courts failed to invent the language "instinct with an obligation." We saw that the use of the rhetoric was a response to the dominant social and economic forces of the period. The time was ripe for greater flexibility in contract law to respond to the realities of long-term contracting and the turn towards legal realism. In the absence of instinct rhetoric, courts probably would have created other language or referred more frequently to existing doctrines to achieve their results. Indeed, the parallel rise of the legal standards of good faith and unconscionability bears out the courts' lack of reticence to create and use dramatic language to serve their purposes.<sup>191</sup>

Notwithstanding this uncertainty about the importance of the instinct language, one lesson that can be learned from the rise of the rhetoric and indeed from the triumph of good faith and unconscionability, is that an important ingredient or catalyst in achieving legal change is the availability and use of *some* powerful rhetoric to propel courts confidently toward new methods and approaches. Examples from other areas of the law support this conclusion. To move the law from the abstract and general "bad tendency" test for determining whether speech received First Amendment protection, Holmes devised the "clear and present danger" standard, which measured the specific

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*Study in Language and Cognition*, in *PSYCHOLINGUISTICS* 481 (Sol Saporta ed., 1961); DeLee Lantz & Volney Steffire, *Language and Cognition*, 69 J. ABNORMAL & SOC. PSYCH. 472 (1964). Legal analysts agree with this assessment. See, e.g., RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 311 (1988) ("language shapes thought . . . [the] choice of words can therefore have political and social consequences . . .").

<sup>189</sup> Winter, *supra* note 188, at 1164.

<sup>190</sup> On the creation and proliferation of promissory estoppel, see generally ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE* 79-106 (2d ed. 1992).

<sup>191</sup> But Arthur Leff complained that unconscionability was an "emotionally satisfying incantation" signifying nothing. Leff, *supra* note 164, at 558-60.

impact of the subject speech.<sup>192</sup> I have already set forth the penumbra metaphor utilized by the Supreme Court in striking a state statute barring the use of contraceptives by married couples.<sup>193</sup>

The need for forceful, even emotional, language to support legal change should not be surprising. Legal reform comes at a price. It upsets accepted methods and manners of thinking about problems. It raises the possibility of mistakes resulting in inferior law. The legal system's reliance on precedent is a testament to the high regard in which it holds the past.<sup>194</sup> To make a clean break, even when logic seems to compel one, the legal community apparently craves the comfort of emotionally appealing language. In this way, strong rhetoric is like a starter motor that ignites the engine of reform. Such a use of language may be illogical and emotional (legal change should be based on substance not form), but it may be necessary and inevitable.<sup>195</sup>

These observations suggest not so much why powerful rhetoric is either good or bad, but why, as Judge Posner points out, it is inherently controversial. Although I argue that instinct rhetoric generally illuminated decisions and provided a vehicle for moving courts in a beneficial direction, others may disagree. Theorists more oriented toward the certainty of rules and the importance of freedom of contract may argue that instinct rhetoric only confuses and licenses illicit judicial intervention in private agreements. In short, powerful rhetoric not only has the potential to clarify, draw attention to, and ignite beneficial ideas, but also can confuse them or, perhaps worse, facilitate the communication of bankrupt ideas.<sup>196</sup>

Not only does language affect a person's understanding and perception of information, the nature of an idea influences one's evaluation of the language

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<sup>192</sup> Vincent Blasi, *The Market Metaphor and the Freedom of Speech: The Holmes Opinion in Abrams v. United States* 27-28 (unpublished manuscript, on file with author); see also David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L. J. 857, 879-84 (1986).

<sup>193</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); see *supra* note 156 and accompanying text.

<sup>194</sup> "[L]awyers and judges lack the freedom of artists to declare openly their break with precedent or their disassociation with the forms of the past." Pratt, *supra* note 12, at 428.

<sup>195</sup> Winter speculates that metaphor may be "inevitable in legal analysis because it is central to human rationality; it is a primary mode of comprehension and reasoning." Winter, *supra* note 188, at 1166.

<sup>196</sup> See Smith, *supra* note 53, at 12 ("[P]owerful rhetoric may contribute to the force of a judicial decision, but it does not guarantee that the judgment is morally or even legally sound.").

presenting it. Language communicating a morally corrupt idea may appear sinister and gratuitous instead of charming and interesting. Consider again *Ciufo v. Ciufo*,<sup>197</sup> where the court found that a marriage was “instinct with an obligation” on the part of an abused wife to share her wealth with her husband. At a time when the unfairness of marital inequality and the horrors of spousal abuse have been exposed, the instinct rhetoric in *Ciufo* seems to lose its appeal and to be rather hollow.

There is a second lesson to be gleaned from this study, then. It is hardly a revelation but still worthy of a reminder from time to time. Although logic and rhetoric are intimately connected, the reader of a legal opinion should be aware of the distinction.<sup>198</sup> She should attempt dispassionately to analyze an opinion’s logic. What is the legal authority for finding an implied term in an agreement? Is the legal authority persuasive? Is it on point? Does the opinion finding such a term appeal to moral, economic, social, or institutional reasons apart from precedent? Are these persuasive? Of course, in many situations, the admonition to avoid, or at least be aware of, the emotional appeal of language may be asking too much of fallible, passionate human beings.

#### IV. CONCLUSION

Justice Cardozo pointed out that logic *and* rhetoric determine the “acceptance and ultimate authority of an opinion.”<sup>199</sup> “Instinct with an obligation” has strong appeal on both grounds. Instinct reasoning presented a new avenue for avoiding formal hurdles to enforcing agreements at a time when formalism was losing appeal and new methods of doing business demanded more flexible law. As time passed, instinct reasoning presented a methodology for incorporating nonconsensual norms in contract cases. Instinct rhetoric was also an aesthetically pleasing alternative to the drab

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<sup>197</sup> 60 N.Y.S.2d 848 (Sup. Ct. 1946).

<sup>198</sup> “When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices . . . then [one] is apt to forget the social forces which mold the law . . .” Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935).

<sup>199</sup> Richard Weisberg, *How Judges Speak*, 57 N.Y.U. L. REV. 1, 50 (1982) (there is a “symmetry in law between form and substance.”); *see also* Smith, *supra* note 53, at 11 (substance and form are “intricately related”).

conceptualism of most legal prose. In short, “instinct with an obligation” was a rhetorical phrase that appealingly channeled the way the contract-law establishment thought about contract law in the twentieth century.